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RHEFHLC/DEPT OF HOMELAND SECURITY WASHINGTON DC PRIORITY  
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C O N F I D E N T I A L SECTION 01 OF 06 BRUSSELS 000219

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E.O. 12958: DECL: 02/24/2020  
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KTFN, PINR, PTER, SO, UNSC, ZI, ER  
SUBJECT: U.S. - EU SANCTIONS INFORMAL

REF: A. 2009 BRUSSELS 1524  
[1](#)B. 2010 BRUSSELS 35  
[1](#)C. 2009 BRUSSELS 101  
[1](#)D. 2010 BRUSSELS 197  
[1](#)E. 2009 BRUSSELS 616  
[1](#)F. 2009 BRUSSELS 493

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Classified By: USEU EconMinCouns Peter Chase for reasons 1.4 (b) and (d).

[1](#)1. (C//NF) SUMMARY. On February 3, an interagency delegation held an off-the-record roundtable discussion on sanctions issues with Spain (current EU Presidency) and the EU institutions. Topics included legal challenges to sanctions regimes, innovations to UN and EU counterterrorism programs, data privacy, North Korea, Zimbabwe, Burma, Eritrea, and Somalia. EU representatives welcomed changes to the UN 1267 (Al-Qaeda and Taliban) sanctions program made by UNSCR 1904, noting the updated EU Regulation implementing those measures. But they indicated some uncertainty concerning future EU implementation of UN 1267 sanctions, given the ongoing designation challenges before EU courts and an anticipated lawsuit by which the European Parliament would assert co-equal authority over legislative design and program implementation. With respect to EU sanctions programs pending annual renewal, EU representatives previewed the rollover of EU sanctions against Zimbabwe, which they expected to include the de-listing of certain individuals and entities. They also said that EU sanctions against Burma would be renewed in April, but that it was too soon to determine whether any modifications to that program would be made. EU targeted sanctions are approaching a sliding scale for due process standards and noFebru renewed.

Q other EU Member States, Torres-Dulce informed the delegation that the Spanish Presidency would remain in listening mode on specific sanctions policies. He then offered some general commentary, describing the impact of the Lisbon Treaty in the sanctions domain. From April onward, the EU will begin establishing various components of its nascent diplomatic corps, the External Action Service ("EAS"). The EAS should create synergies for certain

sectors, including sanctions. His personal view is that Lisbon represents a push toward common European structures and that the EAS will probably increase "structural stability" on many External Relations fronts. Spain is sensitive to the precedents that it is overseeing during its Presidency tenure and is moving cautiously on all post-Lisbon matters for which there is no EU case law.

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LEGAL CHALLENGES TO UN AND EU TARGETED SANCTIONS  
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¶4. (SBU) EU staffers explained that the European Court of Justice ("ECJ") would have new sanctions-related authorities under the Lisbon Treaty. Although there is no established case law for these areas, staffers highlighted that the Court would have jurisdiction on all issues concerning the rights of the individual. All targeted sanctions will therefore be considered under the purview of the Court under the EU's revised treaty structure.

¶5. (C//NF) EU staffers said that UNSCR 1904 was "very welcome" in the EU, but argued that more could potentially be done to strengthen procedural safeguards in the UNSCR 1267 program. EU courts may demand that due process standards for autonomous EU counterterrorism (i.e., UNSCR 1373) designations apply to UNSCR 1267 or other sanctions programs implemented in the European Union. Commission and Council lawyers are currently asserting the opposite to the courts (namely that internal EU/UNSCR 1373 standards should not apply in all cases). But, absent formal jurisprudence, they are only guardedly optimistic about the strength of their arguments. Based on formal legal opinions and informal feedback, staffers understand the courts to be saying, "what does it cost you to enhance the rights of the individual," Commission and Council staffers warned.

¶6. (C//NF) EU sanctions are approaching a sliding scale for due process standards and norms. Council and Commission lawyers are particularly concerned that the ECJ will find "manifest error" in (and seek to review information underlying) listing decisions made by the UN Security Council. EU lawyers are telling the EU courts to "back off" of UN Security Council prerogatives and argue that the intensity of ECJ review should vary across the diverse spectrum of sanctions programs.

¶7. (C//NF) According to Council Secretariat lawyer Richard Szostak, "one area of high risk" involves cases under active review in European courts for which EU institutions have little or no information supporting UN sanctions designations. Szostak cited the Al Faqih case, which will close for filings on February 25. He says that the UN has not provided a statement of case and that the EU currently has no other information with which to defend itself. According to Szostak, the EU finds itself in similar situations with respect to multiple cases concerning UN designations (i.e., UN reference numbers: QI.A.181.04, QE.M.120.05, QI.A.198.05, QI.K.214.06, QE.L.11.01, and QE.L.118.05), all of which are being defended by good lawyers. For Council and Commission lawyers, it is crucial that UN statements of case include facts and not look like hearsay. This is particularly true because the EU does not re-process or add information to documents that it receives from the UN (REF A/Para 9).

¶8. (C//NF) EU staffers explained the EU's internal "review" of UNSCR 1267 terrorism designations, as recently codified in the implementing Council Regulation (EU) No 1286/2009 (REFS A/Para 8, B/Paras 2-5). One Commission staffer asserted that an EU-level review of Security Council designations is not inconsistent with the UN Charter. He said that UN Member States should be regularly updating information concerning sanctions targets, noting that UNSCR 1822 had introduced

concepts and tools that the EU was simply putting into practice. "UNSCR 1904 might not be enough, but all of the tools are there," he stated. He and other EU staffers agreed that the combination of procedural innovations from UNSCR 1822 and UNSCR 1904 "should be enough" to prevent EU courts from blocking implementation of targeted UN sanctions within the European Union. (COMMENT: A final judgment in the "Kadi II" case, currently before the lower court, should help determine if such cautious optimism is warranted. END COMMENT.)

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¶9. (C//NF) The possibility of administrative review applies retroactively for anyone subject to EU counterterrorism sanctions who requests it. Individuals and entities still have only two months to challenge their initial listing before the EU courts, but can submit "observations" and request an administrative review of their designations at any time. Internal EU review will incorporate those observations, along with any information supplied by the UN or EU Member States. The review will end when the EU notifies the applicant of the reasons for its continued designation. Staffers distinguished this "notification of decision" from a point-by-point reply to observations offered by the applicant. They also said that the results of EU reviews would be presented to the UN for information purposes only.

¶10. (C//NF) Despite the lack of clarity concerning other sanctions programs, EU staffers are confident that their autonomous terrorism sanctions (UNSCR 1373) regime remains on solid legal footing. They cited the case of Mujahideen-e-Khalq (MEK, known within the EU as "OMPI," the French acronym for the People's Mujahedin of Iran), which successfully challenged its designation as a terrorist organization in the European Union (See also REF C). In its proceedings, the lower court of the ECJ annulled OMPI's designation, but affirmed that internal EU due process mechanisms were sound. Staffers noted that the EU had drafted its own statement of case against OMPI and was thus not completely reliant upon UN-derived information. (NOTE: France is appealing before the high court the lower court's decision annulling the OMPI designation. END NOTE.)

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DATA PRIVACY OVERSIGHT AND SANCTIONS  
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¶11. (C//NF) The European Data Protection Supervisor ("EDPS") has issued a legal opinion concerning the EU's latest UN terrorism sanctions (UNSCR 1267) implementing Regulation. In his non-binding opinion, the EDPS asserts the authority to access all personal data, including classified information, processed by the EU institutions. With respect to targeted sanctions, the EDPS states that a security clearance and proper handling procedures for sensitive information may be required so that he and the European Court of Justice may "review whether a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights." EU staffers acknowledged that EDPS oversight authority was not restricted by law but stressed that the EU Council was not obliged to recognize his legal opinions. (COMMENT: The European Parliament, which plans to sue the Council and Commission to obtain a greater role in targeted sanctions implementation, will likely seize upon the EDPS legal opinion in its quest for stronger data privacy protection standards. END COMMENT.)

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NORTH KOREA  
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¶12. (C//NF) On DPRK sanctions, EU staffers said that efforts were underway to facilitate EU implementation of measures for which Member States retain competence, including: a

correspondence table for various customs authorities; a new approach to dual-use items (we assume this to mean dual-use Regulation 428/2009); a clause requiring Member States to inform the Commission of steps taken to implement DPRK sanctions; and certain non-binding UN provisions that the EU has rendered binding within its own territory (e.g., restrictions on shipping, specialized training, and financial services).

¶13. (C//NF) Given the possibility of court challenges to DPRK sanctions measures, EU staffers expressed concern over the lack of narrative summaries emanating from the UN.

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Statements of case against DPRK targets need not be very specific, they suggested, since these are being designated largely for their links to a state and jurisdiction. But "a reason would be helpful" vis--vis EU courts, one Council lawyer explained, even if these do not require due process as practiced in the counterterrorism context.

¶14. (C//NF) Commission sanctions staffer Stephane Chardon indicated that provisions for enhanced vigilance in the financial sector were drawn from the EU's latest anti-money laundering ("AML/CFT") Directive. Although DPRK sanctions and proliferation finance issues differ somewhat from the vulnerabilities addressed by AML/CFT Directives, the Commission is attempting to "transpose" other areas of its technical expertise into sanctions mechanisms. According to Chardon, some individual Member States have given further guidance to their financial institutions with respect to DPRK sanctions implementation. (COMMENT: The EU continues to resist issuing an EU-wide advisory, however. END COMMENT.)

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ZIMBABWE  
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¶15. (C//NF) Spain indicated that a new EU Council Decision (FKA Common Position) on Zimbabwe would be finalized over the following days and described forthcoming changes to the EU's sanctions program. (NOTE: The Common Position underlying that program was due to expire February 20, prompting the EU to review/renew existing measures. See REF D for information about the eventual rollover. END NOTE.) After intense debate and compromise, Perm Rep officials from the EU Council's Africa Working Group (COAFR) have agreed to remove six (6) individuals and nine (9) entities from the EU's designation list. The individuals include one person who has left the GoZ, four who are now deceased, and one, Thamer Al Shanfari, whom the EU has assessed no longer meets designation criteria. Eight of the entities are Zimbabwean parastatals that were designated by the EU on January 27, 2009, but which have been judged, based on reporting from EU Member State missions in Harare, to be under control of the Zimbabwean finance ministry and thus de-linked from ZANU-PF. Apart from these de-listings, all EU measures would be renewed for twelve months, despite a strong preference for a six-month rollover among some Member States.

¶16. (C//NF) The U.S. delegation informed EU counterparts that parastatal designations were assessed by the USG to be a significant leverage point vis-a-vis Robert Mugabe and ZANU-PF, and cautioned that the de-listing of these entities would most likely diminish EU leverage with respect to the Zimbabwean regime.

¶17. (C//NF) U.S. officials also emphasized the need for transatlantic political unity on Zimbabwe, in particular since that country is not subject to UN sanctions. EU staffers and the Spanish Presidency then previewed the draft public "conclusions" that would accompany the new Council Decision. These would state firstly that sanctions were still appropriate and were being renewed due to insufficient political progress in Zimbabwe. Staffers were adamant that select de-listings did not refute this statement and that

signs of dynamism in the EU program would encourage and empower the MDC. They nonetheless agreed to avoid public statements that could undermine USG political messaging. The de-listings would thus be treated as a group and in generic terms in secondary "conclusions."

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BURMA  
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¶18. (C//NF) EU sanctions against Burma are due to expire on April 30. Spain had not yet begun work on a renewal Council Decision, nor had it received draft text from EU Member States or institutions. None of our interlocutors had a

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clear sense of the political direction among Member States, but all agreed that major changes to the EU program were unlikely in the immediate future. EU sanctions against Burma are comparatively complex, and new measures were instituted as recently as August 2009. Spain expects to initiate the rollover process with a relatively standard 2-month lead time in case of unforeseen complications during internal negotiations. An anticipated EU official visit to Burma may not happen before the end of April and should not conflict with EU sanctions, by which Member States have suspended all high-level bilateral engagement with the GoB. The EU visit will most likely take place at the Director level.

¶19. (C//NF) EU staffers were dismissive when pressed about their and Member States' implementation of existing prohibitions on certain Burmese exports. "If Thailand won't act, it's hard to do anything," one staffer lamented. Another acknowledged that Burma engaged in only a small percentage of its total trade with the U.S. and EU; Western import restrictions could therefore be only minimally effective at best.

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ERITREA, SOMALIA, AND MORE ON DUE PROCESS VARIANCE  
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¶20. (C//NF) Council Secretariat sanctions staffer Francesco Fini called the due process elements of UNSCR 1907, concerning Eritrea, "weak" when compared to other sanctions programs. He then asked if this was because the UN was targeting a political regime. Fini sees a pattern whereby different standards/norms of due process appear, depending on the focus of a sanctions program. In his view, programs focused on non-state actors and individuals unaffiliated with political regimes, such as DRC sanctions, tend to provide robust due process elements. Conversely, programs targeting state actors and individual political elites offer few procedural safeguards. While these trends may seem coincidental, they are important for EU institutions, which are increasingly wary of court challenges. "We will want to know, what is the scope of due process to apply" in the context of Eritrea sanctions, Fini informed the delegation.

¶21. (C//NF) EU staffers were keen to know when designations would be finalized in the UN/Somalia sanctions committee. The EU has not yet passed a Regulation to implement its Somalia sanctions Common Position (2009/138/CFSP of 16 February 2009) and is therefore unprepared for a roll-out of UN measures. Staffers expect the Regulation, a strict implementation of UNSCR 1844, to be ready by the end of February.

¶22. (C//NF) Fini again raised the due process issue with respect to targeted Somalia sanctions. He noted that the procedural safeguards found in UNSCR 1844 came more or less directly from UNSCR 1822 concerning Al-Qaeda and the Taliban. Fini asked iQ3QEce'Ksthe EDPS states that a security clearance and proper handling procedures for sensitive information may be required so that he and the European Court of Justice may "review whether a fair balance is struck between the need to

combat international terrorism and the protection of fundamental rights." EU staffers acknowledged that EDPS oversight authority was not restricted by law but stressed that the EU Council was not obliged to recognize his legal opinions. (COMMENT: The European Parliament, which plans to sue the Council and Commission to obtain a greater role in targeted sanctions implementation, will likely seize upon the EDPS legal opinion in its quest for stronger data privacy protection standards. END COMMENT.)

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